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Book Review

ENCOUNTERS WITH THE AUSTRALIAN CONSTITUTION by Michael Cope
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ENCOUNTERS WITH THE AUSTRALIAN CONSTITUTION, by MICHAEL COPER
(CCH AUSTRALIA LIMITED, SYDNEY), pp i-x, 1-502, with end notes,
the Constitution, Table of Cases, Table of Illustrations,
Acknowledgments and Index, Recommended Retail Price \$
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I must be getting old. The hard sell for this book prejudiced me against it. The ethos of modesty and reserve which Australian lawyers have inherited, with the law books, from England, rather turned me against it even before I had seen it. First, there was the razzamatazz of the "launch" in the Botanical Gardens (no less). And by Mr Whitlam (who else?). Then there were the television and radio reviews and commentaries. Every lawyer knows that the only place for a book review on a "proper" book about constitutional law is a law journal - like this one. As if this were not enough, for six months one could not open a legal publication without a glossy flyer about this book falling invitingly into one's lap. It bordered on a scandal. It had never been done before. The finest subtleties of the minds of our judges had been lavished on our Constitution. The most delicate nuances of interpretation were reserved to this activity. The deepest erudition - with scarcely a hint of high politics and policy - surely deserved from a law professor more restraint. More dignity. More "black letter law".

Imagine, then, my surprise to open this book and find an endorsement by no less than the Governor General (Sir Ninian Stephen). "There is a distinct risk", he declared, "that Coper may have committed the primal sin of converting constitutional law into reading for pleasure". That was the last straw. Every lawyer knows that constitutional law challenges the Jesuitical subtlety of the mind. It is the law student's castor oil, it is to be taken, like Limitation Acts and remainders, for the good of the lawyerly soul - not for enjoyment.

I am ashamed to say that I enjoyed the opportunity to review this book. It plunged me into Coper's rather idiosyncratic vision of the Australian Constitution. He admits that it started as a "coffee table" book. It still bears some marks of this. It is replete with an interesting - if sometimes odd - collection of photographs and cartoons to illustrate passages in the text. Some of them are quite conventional, eg the portrait of the future King George V opening the first Federal Parliament and the photograph of Tom Roberts in the course of painting that portrait. Then there are the studio portraits of Robert Garren and Dr John Quick - Coper's rather more respectable forbearers of Australian constitutional analysis. There is a rich helping of turn-of-the-century cartoons. And then some vivid recent photographs. The majestic Franklin River, preserved by the oddest quirk of constitutional fate. There is also the "invasion" of Britain, with the landing of Paul Coe and friends at Dover Beach in 1976 where they raised

the Aboriginal flag in retaliation for January 1788. And, surrounded by a horde of jostling journalists, there is the stalwart Lionel Murphy, emerging from one of his litigious travails in the Supreme Court, in July 1985.

I say that this is an idiosyncratic examination of the constitution because it picks out a few themes of apparent interest to the author and leaves others alone. These themselves are used to illustrate the way the constitution works. Coper begins with "an external affair". Under this head, he examines Mrs Kirmani's brush with s.503 of the Merchant Shipping Act of 1894 (Imp). See (1985) 159 CLR 351, 461. The whole course of her litigation is traced. And there are unusual human features added to it. Mrs Kirmani is described. For Professor Coper she is the "patient Mrs Kirmani". Not content with pen pictures, there is even a photograph of her. And above her photograph there is one of Mohamed Metwally who had to find his way through the overlap of federal and state laws on race discrimination subject. According to Coper, he is "a victim of the federal system". Mr Metwally lost. But he lost narrowly. See (1984) 158 CLR 447. As Coper points out "if only one judge had taken a different view of the concept of an "external affair" (as provided by s 51 (xxxv) of the Constitution) Mr Metwally's life would have "turned out rather differently". This leads the author into the study of the Franklin Dam case where there was a similar tight division in the High Court of Australia concerning the federal constitutional power. See (1983) 158 CLR 1. The chapters end with what would once have been an academic

impertinence. "Who was right?" asks Coper in relation to the Tasmanian dams case. And then, horrors, he turns to "law, politics and history". Lawyers of the Dixonian tradition of "strict and complete legalism" would shudder at this blunt and unashamed examination, in the context of constitutional law, of the politics of Australia's place in the international community and the federal balance within the nation.

Starting with a provision which appears in the middle of the Constitution may seem an odd way to embark upon a text about the Constitution. But the object is to intrigue the reader and to demonstrate the humanness of the issues raised and the big power questions which stand above the contestants and play with them - like puppets on a string. The book then turns, in a more conventional way, to the establishment of the Australian colonies and the beginning of the federal movement. Further signs of the eccentricity of the author (or at least of his unorthodoxy) can be seen by the way in which these historical sections lead into discussion of a number of particular topics. They include the theoretical basis of the omnipotence of Parliament; the implications of the separation of powers; the persona designata doctrine (called "an elaborate charade") and several others. No doubt those of a traditional, analytical temperament would find this a motley collection. But it is all part of Coper's grand design to make discussion of the Constitution interesting.

The book then leaps straight into the "engine room of the constitution" - the High Court of Australia. There is a

photograph of the Dixon court in 1964 - "the seven black crows in spectacles". By contrast a 1981 photograph of the justices takes on a more human face. But the function remains much the same, as the author describes it at the very end:-

"The High Court is not an assembly of Wise Persons, free to soar on the wings of policy as it sees fit. Nor is it an assembly of Legal Automaton, releasing the law on the slot machine theory of jurisprudence. It hovers somewhere between these two extremes, endeavouring not to stray so far from the letter that it endangers its legitimacy, nor to come so close to it that it endangers its credibility".

There is a discussion of politicians as High Court Justices. And then a reverse discussion of the Justices acting as politicians - interfering in matters where, it is suggested, they should not. Nothing appears in these revelations that comes anywhere near the disclosures in B A Murphy's "The Brandeis-Frankfurter Connection" (Oxford, 1982). However it is interesting now to read recent revelations about Latham CJ's links with his former political colleagues. See (1987) 7 Adel L Rev 174, 194. Also of interest in this connection is the way public attention to the personalities of the Justices has increased enormously in recent years. The melancholy story of Lionel Murphy's second last struggle (this time against removal for misbehaviour) is all recorded. The author's conclusion is unremarkable. It is a court of "rugged individualists".

There then follows a chapter on the High Court's steady extension of Commonwealth power. It incorporates a dramatic vignette about the young Robert Menzies victory over implied state immunities, in dialogue with Knox CJ and Starke J. Indeed, the book is full of historical anecdotes, many of which

I have not seen elsewhere. They bear the mark of the author's attention to the unusual. There is quite a heavy section on the federal use of fiscal powers. It has been principally by the power of the purse that the Commonwealth's constitutional role has expanded so remarkably - supported, at critical moments, by High Court decisions.

Chapter 6 reviews what is called "Apocalypse 1975". The event of that Remembrance Day suddenly made constitutional power a matter of general public concern. How could the Governor General do this? Coper, aided by numerous Pickering cartoons gives his version. Chapter 7 turns to s 92 - the promise of free trade, commerce and intercourse. A "boon to lawyers" and a "curse of the Constitution" was Sir John Latham's judgment of it. The author is undeterred. Together with copious citations from the Commonwealth Law Reports, there is also an allusion to Monet and Debussy which would be a kindness not to unravel.

Provocatively, Coper asks in Chapter 8 "Is there a Bill of Rights in the Constitution?" The relatively few provisions which would claim that role have been given a rather damp construction, as the author points out. He makes it fairly clear that he likes the Murphy constellation of "implied rights". He regards as rather too orthodox the opinion of the Court of Appeal in the BLF case (see (1986) 7 NSWLR 372). But this opinion also discloses his argument for a written Bill of Rights, approved by the people. Unless this is enacted, judges have only a limited legitimacy to draw implications about human

rights guarantees which the people and their representatives have not chosen to spell out.

The final sections called, with typical irreverence "Rewriting the lyrics" and "Rewriting the music" take the reader down the rather discouraging path of formal constitutional change. The large changes occurring in the Constitution have been achieved by High Court interpretations - not by popular referenda. "Constitutionally speaking, a frozen continent", was Geoffrey Sawer's diagnosis of Australia. In the Bicentennial year, we are in the midst of the latest effort at formal amendment. But a reading of this last section is sobering. It tends to suggest that, in the future, much will continue to hang on the approach taken by the High Court Justices to the meaning of our Constitution and to where power lies under it.

Summing it up, Coper asks whether the High Court is made up of "policy mandarins or cardboard legalists"? There are, it is suggested, "contrapuntal themes of the judicial process". Simultaneously, there are demands for stability and change; for settling disputes and making general rules; for exhibiting scepticism and of showing faith. Looking at our Constitution and remembering, as Sir Ninian Stephen once pointed out, that it represents political and economic philosophies, formed (for the most part) in the 1860's, we have done surprisingly well despite all. The Australian Constitution remains one of the oldest constitutions on earth still in use. Leaving aside the collection of English statutes which pass for a Constitution,

there is only the United States' revolutionary constitution and the old British North America Act to vie with ours. And as the Canadian constitution has now been "patriated" and re-packaged in a way that one suspects would delight Professor Coper, with a Charter of Rights and Freedoms - we can really say that ours is up there with the United States constitution. But although venerable, it is unloved. Although critically important, it is unknown. Although enduring rather well, it is largely unappreciated. Although creaking at the seams, it is impervious to formal change.

This analysis of the Constitution of the Australian Commonwealth lacks the historical authenticity of Quick and Garren. It lacks the subtlety and polish of Dr Wynes. It cannot rival the analytical clarity and conceptual thinking of Colin Howard. It is, from first to last a very personal encounter with the Constitution. But if it takes the history, operation and letter of the Constitution into the homes of lawyers and other citizens, that will be no bad thing. To do so in the Bicentennial year makes it specially timely. If Coper can do this for 1988, what fireworks can we expect from him in 2001!

M D KIRBY*

* The Hon Justice Michael Kirby CMG, President, Court of Appeal, Supreme Court, Sydney.